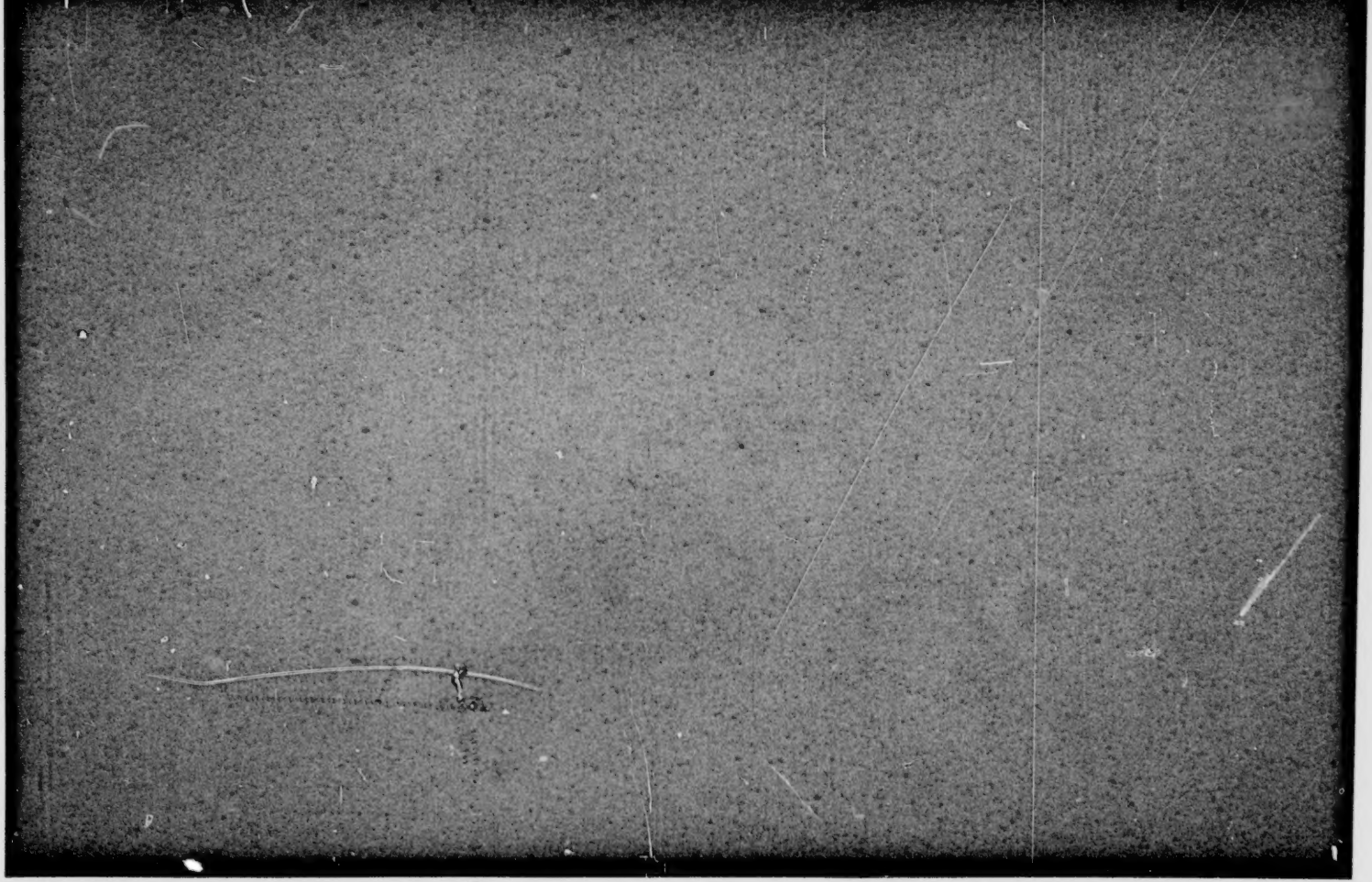

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BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK AND OF CAMPAIGN CLEAN WATER INC.

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STATEMENT OF THE QUESTION INVOLVED

WHETHER THE EXECUTIVE BRANCH OF GOVERNMENT MAY REFUSE TO SPEND $11 BILLION FOR WATER TREATMENT FACILITIES DESPITE A CONGRESSIONAL MANDATE TO SPEND THIS AMOUNT, DESPITE LEGAL AUTHORITY REQUIRING EXPENDITURE OF THIS AMOUNT, AND DESPITE COMPELLING PUBLIC POLICY ARGUMENTS TO SPEND THIS AMOUNT?

The People of the State of Michigan say "No."

INTEREST OF THE AMICUS

The People of the State of Michigan comprise more than 8,875,000 residents as of the 1970 census. The area of the State of Michigan includes more than 96,720 square miles.

The People of the State of Michigan are vitally concerned furthermore, with matters of environmental quality affecting their air, land, and water, and in this regard have enacted comprehensive legislation.

Because of this commitment to a better environment, the People of the State of Michigan believe that they will need to spend approximately $1.8 billion in the 1970's to build water treatment facilities. Under the Federal Water Pollution Control Act Amendments, Congress mandated $980 million for water treatment facilities to the State of Michigan. On November 28, 1972, the Administrator of the Federal Environmental Protection Agency announced that Michigan will only receive $481 million.

This cutback in federal funds means:

> Possible five to ten year delays in water treatment construction programs in Michigan.
>
> Possible delays in eliminating phosphorous discharges which are blamed for deterioration of the Great Lakes.
>
> Untenable delays for small communities who need funding to build long delayed water treatment facilities.
>
> Severe setbacks for metropolitan areas seeking to improve their water treatment facilities.

In short, the impounding of federal funds severely impairs the ability of Michigan to abate water pollution.

The People of the State of Michigan view the outcome of this litigation, therefore, with profound concern. We are convinced that a ruling of this Court permitting the executive branch of the federal government to impound funds mandated by Congress for water pollution control would have a deleterious effect on the citizens of Michigan and on the water resources of Michigan.

The State of Michigan, consequently, respectfully files this brief as amicus curiae pursuant to Rule 42 of the rules of this Court.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

CONSOLIDATED CASES: No. 73-1377 and No. 73-1378

RUSSELL TRAIN, Administrator of the Environmental Protection Agency,

Defendant-Appellant,

vs.

CITY OF NEW YORK, et al.,

Plaintiffs-Appellees.

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK AND OF CAMPAIGN CLEAN WATER INC.

STATEMENT OF THE CASE

The Federal Water Pollution Control Act Amendments of 1972, Pub L No 92-500, 86 Stat 816, were enacted into law when both houses of Congress overrode a presidential vote. The Senate vote was 52-12; the House vote was 247-33.[1]

One month later, the President instructed the administrators of the Environmental Protection Agency to withhold from the States more than half of the allotment of funds for wastewater treatment facilities enumerated in the amendments to the Act. Instead of following the statutory ceilings of $5 billion for 1973 and $6 billion for fiscal 1974, the President established the

[1] 118 Cong Rec H 10, 226-73 (daily ed Oct 18, 1972); 118 Con Rec S 18, 546-54 (daily ed Oct 17, 1972).

allotments for those years at $2 billion and $3 billion respectfully.[2]

The impoundment of these funds by the executive is the basic issue of this litigation.

The brief of the State of Michigan in opposition to executive impoundment of water control funds now follows.

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[2]

Letter to William Ruckelshaus, EPA Administrator, from President Richard Nixon, Nov 22, 1972, in Hearings on Federal Budget for 1974 before the House Committee on Appropriations, 93rd Cong. 1st Sess. 194-95 (1973).

INTRODUCTION

"The frog does not
Drink up
The pond in which
He lives."

—American Indian Proverb.

The possibilities of losing our water supply by depletion or pollution evoke fears almost as old as western civilization. To destroy sweet water is to threaten life. The effects of such a loss are so awesome that the power to accomplish it was ascribed early in our experience only to the deity who apportioned the power among a select few. So Moses threatened Pharoah:

> "Behold, I will smite with the rod that is in my hand upon the waters which are in the river, and they shall be turned. And the fish that are in the river shall die, and the river shall become foul . . ."
>
> [Exodus 7:17-18.]

But, 4000 years later, the "select few" have multiplied several million-fold, and today foul rivers and dead fish are commonplace. To appreciate the magnitude of the problem, it is necessary to understand the extent of our need for water.

In 1963, experts estimated that the maximum amount of fresh water available for all uses in the United States was approximately 650 billion gallons per day.[3] It was estimated that the total fresh water usage eight years ago was 360 billion

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[3] Report of the Staff of the Senate Committee on Public Works, 88th Cong., 1st Sess., A Study of Pollution — Water 3 (Comm. Print 1963), cited in Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality Part I: State Pollution Control Programs," 52 Iowa L. Rev. 186 at 187, fn. 2.

gallons per day.[4] The projection for the year 2000 was 1000 billion gallons per day.[5] Since this is 350 billion gallons more than we have available, if the experts are within a 30% margin of error, we can better understand Pharoah's predicament.

Two feasible solutions have been suggested. One is to refine the process for making sea water potable,[6] and the other is to re-use our present water several times: to re-cycle water as we do aluminum, glass, and paper.[7] But in any case, it is necessary to safeguard the quality of even that water we intend to re-use. As Professor Hines observed in Part I of his Iowa Law Review trilogy on this general problem, 52 Iowa L Rev at p 188:

> "Re-use of water requires that certain water quality levels be maintained, however, and here is where water pollution is a critical obstacle to the assurance of adequate water supplies for the forseeable future. * * *"

Two conclusions are reached from Professor Hines' triilogy and from a review of commentators he cites.[8] First, the water crisis will worsen, not abate, without strenuous efforts

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[4]
Hines, p 188, fn. 3.

[5]
Id.

[6]
Carr, *Death of the Sweet Waters*, 211-213 (1966).

[7]
See, Bryan, "Water Supply and Pollution Control Aspects of Urbanization," 30 Law & Contemp. Prob. 174 (1965).

[8]
F. Graham, *Disaster by Default: Politics and Water Pollution* (1966); Wright, *The Coming Water Famine* (1966); Rodale, *Our Poisoned Earth and Sky* (1964); Carson, *The Silent Spring* (1962); Stein, "Problems and Progress in Water Pollution," 2 Natural Resources J 388 (1962).

to conserve our present supply. Second, even with such strenuous efforts, developments in processes for re-cycling and for desalinization are necessary if we are to survive as a civilization.

Michigan, furthermore, has a deep concern with this crisis over pollution of our water resources. Michigan abounds with water resources. For instance, the State of Michigan has 3,177 miles of shoreline, more than any other state in the nation, except Alaska. Additionally, Michigan covers 38,575 square miles of the Great Lakes. Within the state, there are 11,037 inland lakes. The length of the courses of major rivers in Michigan is 5,499 miles; in addition, there are an estimated 30,000 miles of tributaries.[9] Therefore, Michigan acutely feels the pain of the loss of federal water pollution control funds.

With the concern of its vast and valuable resource at stake, the People of the State of Michigan, amicus curiae herein, vigorously challenge the authority of the executive to reduce the allotment of funds authorized by Congress for water polluton control.

Indeed, the People of the State of Michigan hear and respond now to the ominous threat which Moses once made to the Pharoah.

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[9]

See, *Encyclopedia Americana*, Vol XIX, p 18 (1960) and *Michigan Manual*, 1971-72, p 1.

ARGUMENT

I.

EXECUTIVE IMPOUNDMENT OF WATER POLLUTION CONTROL FUNDS DESPITE A MANDATORY CONGRESSIONAL APPROPRIATION IS WITHOUT STATUTORY OR CONSTITUTIONAL AUTHORITY.

A. CONGRESS HAS MANDATED THAT $11 BILLION FOR THE FISCAL YEARS 1973 AND 1974 BE APPROPRIATED FOR THE CONSTRUCTION OF WASTE WATER TREATMENT FACILITIES TO ABATE WATER POLLUTION.

> "The whole effort [of pollution abatement] is lagging now for a number of reasons, one of which is that the Federal government hasn't put money on the line."
>
> — Stewart Udall, 1969 quoted in *Water Wasteland*, by David Zwick and Marcy Benstock, (Bantam Books, 1972), p 305.

Enthusiasm for water pollution abatement is often tempered by the notion that large expenditures of public funds are necessary to restore ecological sanity. Thus, the history of water pollution abatement is one where financial commitments have failed to match up with rhetorical pledges.

For instance, even though President Lyndon B. Johnson boldly announced in 1966 that "the promise is clean rivers, tall forests, and clean air — a sane environment for man,"[10]

[10] US Congress, House of Representatives, Congressional Record, Feb. 23, 1966, p 3667.

and even though President Richard M. Nixon declared in 1970 that "the 1970's absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters and our living environment,"[11] the hard facts tell a different story with respect to water pollution control.

In fact, the executive branch has a long history of spending no more than it absolutely has to for water treatment facilities. The following chart outlining the large backlog of unapproved grant applications for four states and one territory as of June 30, 1970, suggests the real problem:

Applications pending June 30, 1970 at state agencies and FWQA regional offices	*Fiscal 1970 allocation*	*Estimate of backlog (applications pending minus fiscal 1970 allocation)*
	(all figures in millions of dollars)	
New York	$592.3	$69.9	$522.4
Michigan	114.9	33.0	81.9
District of Columbia	49.9	3.8	46.1
Indiana	59.5	20.0	39.5
Maryland	52.1	13.6	38.5

[It is important to remember that these figures do not measure the total extent of need, since it has been found that many cities do not bother to apply for grants when funding levels are low.].[12]

[11]

Quoted in *Congressional Record*, Volume 116, page 16,096, Sept. 21, 1970 (daily edition).

[12]

Zwick and Benstock, *Water Wasteland*, (Bantam Books, 1972) p 315. Viewing the entire problem from a different perspective, the executive only spent $262 million of the $800 million appropriated in 1970 for water pollution control and $475 million of the $1 billion appropriation in 1971. See, Green, Fallows and Zwick, *Who Runs Congress?* (Bantam/Grossman Book, 1972) pp 114-115.

In short, the history is evident — pledges are conveniently ignored when the practical work of disbursing money for water pollution treatment is actually undertaken.

Faced with this history, Congress passed a water pollution measure on October 4, 1972 entitled the Federal Water Pollution Control Act Amendments of 1972, 15 USCA 1251 et seq, which authorized appropriations in the amount of $11 billion for the fiscal years 1973 and 1974 to be used for water waste treatment construction grants. Although the bill was vetoed by the President, the veto was promptly overturned by Congress.

Turning to the Federal Water Pollution Control Act Amendments of 1972, two specific sections stand out in their importance to this litigation. Section 207, reads as follows:

> "There is authorized to be appropriated to carry out this title, other than section 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 . . . ."

Additionally, Section 205 provides:

> "(a) Sums authorized to be appropriated pursuant to Section 207 for each fiscal year beginning after June 30, 1973, *shall be* allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for the fiscal 1973 *shall be* made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums *shall be* allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly

> owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States . . . ." [emphasis ours.]

We firmly support the view that the language of the Water Pollution Control Act Amendments of 1972 imposes a mandatory duty on the executive branch of government to allot exactly the sums stated in the Act. There is no discretion in the allotment stage; the use of the word "shall" is mandatory language.

The plain language of the Federal Water Pollution Control Act should, indeed, govern this litigation. Two extremely eminent members of the Supreme Court have commented upon the controlling nature of the language of a statute as follows:

> "We do not inquire what the legislature meant; we only ask what the statute means."
>
> [Mr. Justice Oliver Wendell Holmes, Collected Legal Papers, 207.]

and

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute."
>
> [Mr. Justice Felix Frankfurter, quoted in 47 Col L Rev 527, 543 (1947).]

We submit the language of the Federal Water Pollution Control Act Amendments of 1972 is without equivocation, the Administrator of the Environmental Protection Agency must allot the $11 billion authorized for water treatment facilities.

B. THERE IS A GROWING LIST OF LEGAL PRECEDENTS DECLARING EXECUTIVE IMPOUNDMENT OF A MANDATORY CONGRESSIONAL APPROPRIATION TO BE UNLAWFUL.

> "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that the existence of such a broad power is supported by neither reason nor precedent."
>
> — Memorandum from then Assistant Attorney General William H. Rehnquist to Edward L. Morgan, Deputy Counsel to the President, December 1, 1969 at 8. Quoted in 22 Stan L Rev 1240, 1250 (1970).

The announcement by the President that federal water pollution control funds would be impounded triggered a series of law suits by citizens, municipalities and states. The culmination of this extensive litigation is the consideration of the issue by this Court. Although various lower federal court decisions have split on the issue of executive impoundment, we submit that the better view as enunciated in lower federal court decisions sets out a compelling legal argument against executive impoundment of water pollution control funds.

The principal argument in opposition to executive impoundment rests on a careful reading of the statute and the legislative history which in turn spells out the notion that the allotment of $11 billion in water pollution control funds is a mandatory duty imposed on the Administrator of the federal Environmental Protection Agency. For instance, in *Martin-Trigona v Ruckelshaus*, (No 72C 3044, DC ND Ill, July 9, 1973) [5 ERC 1665, 1669], the Court announced this view in clear terms: ". . . the Act provides for mandatory allotment of all funds." The US Court of Appeals for the

District of Columbia reached the same conclusion when it said in *New York City v Train*, (CA DC No 73-1705, January 23, 1974) [6 ERC 1177, 1188]:

> "Our reading of the relevant statutory language and careful analysis of the pertinent legislative history compels us to hold that Section 205(a) of the Act requires the Administrator to allot the full sums authorized to be appropriated in Section 207 . . ."

We submit, therefore, that the better view requires allotment by the executive of the full sums for water pollution control — $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

The rationale for the mandatory view of the allotment of water pollution control is further explained in *Texas v Fri*, (DC WD Tex, No A-73-CA-38, October 2, 1973) [5 ERC 2021, 2023], when the Court found that:

> "Evaluation of the Act as a whole and its legislative history evinces an unmistakable congressional intent to marshall the requisite federal funds to achieve the water quality goals set forth in the Act."

This spirit and intent of the Federal Water Pollution Control Act has further resulted in several courts declaring the executive impoundment to be an abuse of discretion. For instance, in *Campaign Clear Water v Ruckelshaus*, (DC ED Va, No 18-73-R, June 5, 1973) [5 ERC 1441, 1447], the Court declared that it:

> ". . . is well-satisfied that the challenged impoundment policy, by which 55% of the allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act, and a flagrant abuse of executive discretion."

In *Minnesota v EPA*, (DC 4th Div Minn, No 4-73 Civ 133, *June* 25, 1973) [5 ERC 1587, 1592], the Court similarly responded to the government's argument that impoundment was based on matters of the national economy as follows:

> "Nothing in the Act gives the Administrator the authority to consider matters outside the corners of the Act itself. In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress."

Finally, we offer a line of decisions of this Court which negate the proposition of executive impoundment: *Kent v Dulles*, 357 US 116 (1958); *Cole v Young*, 351 US 536 (1956); *Peters v Hobby*, 349 US 331 (1955); and *Youngstown Sheet and Tube Co v Sawyer*, 343 US 579 (1952).

We submit, therefore, that as a matter of legal precedent, both recent and past, executive impoundment of a mandatory Congressional Appropriation should be rejected.

C. EXECUTIVE IMPOUNDMENT OF WATER POLLUTION FUNDS DESPITE A MANDATORY CONGRESSIONAL APPROPRIATION IS WITHOUT CONSTITUTIONAL AUTHORITY.

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ."
>
> — US Const. Art I, Sec. 9.

Under the federal Constitution, exclusive authority over federal spending is vested in Congress. See, US Const, Art I, Sec. 9. It is Congress that has a final say over what becomes law and a veto, not impoundment, is the only way the President can express his displeasure with an appropriation measure. This argument is buttressed by Article I, Section 7 of the US Constitution which gives Congress the right to override presidential vetoes of legislation.

The President has no power to veto legislation absolutely. No item veto is granted to the President under the Constitution. Indeed, if the executive branch of government is permitted, at will, to refuse to spend funds after a statute has been enacted into law, then the executive branch will exercise an absolute authority which is not authorized by the Constitution and which directly contravenes the right of Congress to override a presidential veto under the Constitution.

The above analysis is quite significant in the instant situation since the President initially vetoed the appropriation for water pollution control. Congress, however, by two thirds vote overturned the President's veto. Yet, the executive now seeks to ignore and circumvent the Congressional mandate that it is in the interests of public policy to spend $11 billion for water pollution abatement by a program of executive impoundment.

We submit, furthermore, that Congressional control over the purse is not merely a negative power to establish a limit on spending but rather is a full and positive authority to compel the expenditures of funds. By freezing vast sums of appropriated funds, the executive challenges without authority the most basic and sacred right the Constitution has vested with Congress — the power of the purse.

D. THE EXECUTIVE SHOULD FAITHFULLY EXECUTE THE LAWS OF OUR COUNTRY.

> "[The President] shall take Care that the Laws be faithfully executed . . ."
>
> — US Constitution, Art II, Section 3.

The executive branch has no choice but to abide appropriations statutes. Before he may enter service of his office, the President must take the following Oath: "I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." US Const, Art II, Sec. 1. Included among the duties of the President is the duty to faithfully execute the laws of the land. US Const, Art II, Sec. 3.

Indeed, our history is predicated on the fact that we are a nation of laws. This is not to say that the executive branch is without authority or discretion. The executive has discretion, but that discretion must be exercised within the four corners of the Federal Water Pollution Control Act Amendments of 1972 which provides for a mandatory allotment of $11 billion in water pollution control funds.

Placing all of the arguments and authorities acknowledged in this litigation in perspective, we submit that the faithful execution of the laws of our country should receive the highest of priorities.

II.

THE INTEGRITY OF CONGRESS AND OF OUR SYSTEM OF GOVERNMENT STANDS IN JEOPARDY AS A RESULT OF EXECUTIVE IMPOUNDMENT OF FEDERAL WATER POLLUTION FUNDS.

A. THE EXECUTIVE SHOULD NOT BE ALLOWED THE PRIVILEGE OF IGNORING A MANDATED APPROPRIATION OF CONGRESS FOR THE PROTECTION OF THE PUBLIC HEALTH AND WELFARE.

> "There is a natural inclination in mankind to Kingly Government."
>
> — Warning of Benjamin Franklin in 1787 to the delegates to the Constitutional Convention, 1 M. Farrand, *Records of the Federal Convention of 1787*, at 83 (1966).

At stake in this litigation is whether the government will institute adequate financing for measures to restore the purity of our nation's waters. The executive branch has seriously limited the federal government's commitment in this area by impounding $5 billion of an $11 billion appropriation by Congress for water pollution treatment facilities. As Governor William G. Milliken of the State of Michigan has commented on this executive impoundment:

> "This action represents a serious blow to our efforts aimed at achieving clean-water goals in Michigan and throughout the Great Lakes region in this decade." [*The Detroit News*, November 30, 1972, p 1-c.]

The Governor's comments can certainly be applied to all

concerned state and local officials who hope to take effective steps towards abating pollution of our nation's waters.

Certainly, the executive is entitled to its opinion that certain expenditures will unacceptably inflate the economy. But, Congress is constitutionally entitled and in many fields is able, to make its own judgment on such matters, to decide national priorities by its own wisdom and to legislate accordingly. And so, in the case of waste water treatment plants, Congress has directed the authorized amount of $11 billion to be fully allocated among the states. In short, Congress has decided what the national priorities should be and the executive must accept this decision.

To allow the executive to ignore the judgment of Congress would be to completely negate the Congressional veto power and to completely ignore the desirability of abating water pollution. We submit that Congress adopted legislation towards building an environment other than depicted by T. S. Eliot in "The Waste Land" where "the dry stone [knows] no sound of water."

B. EXECUTIVE IMPOUNDMENT ERODES THE FOUNDATION OF REPRESENTATIVE GOVERNMENT.

> "The growing practice of impoundment, whereby the executive branch fails to expend funds according to the intent of Congress, looms as yet another force eroding the foundation of representative government."
>
> — United States Senator Frank Church of Idaho, 22 Stan L Rev 1240, 1241 (1970).

Once it is widely recognized that a program affecting the public health and welfare which is enacted into law by

Congress can be effectively obstructed and buried by the executive branch, the American people will sense the futility of working with their elected representatives. Yet, a crucial element of our democratic form of government is the right afforded to diverse political interests to appeal in a meaningful way to members of Congress.

Our government is based on three separate, but co-equal branches of government. The executive branch is not the only important forum for policymaking. Each branch of government, additionally, operates as a check and a balance on the other branches. The executive branch does not operate as the sole or the final check on matters of public concern.

The ability of Congress to act with authority on appropriations reflects on the operation of our three branches of government. The struggle is monumental but the solution must be directed to maintaining public confidence and reliance on our representative bodies and on our system of separation of powers.

CONCLUSION

> "The founding fathers, in establishing our national government, reflected clearly the lessons they had absorbed concerning the history of man's struggle to be free from tyranny. They knew that those entrusted with governmental powers are susceptible to the disease of tyrants — to what George Washington described in his Farewell Address as the 'love of power and proneness to abuse it.' They realized that the powers of public officers should be defined by laws which they, as well as the people, are obliged to obey, and that liberty demands control by constant and uniformly enforced laws rather than by the arbitrary and inconstant whims of willful men."
>
> — United States Senator Sam J. Ervin Jr., from North Carolina, 35 Law and Contemporary Problems 108, 121 (1970).

The PEOPLE OF THE STATE OF MICHIGAN believe that our country should strive towards restoring the purity of our waters, that our government is a government of laws, that executive impoundment represents a threat to representative government and that executive impoundment is without statutory, case or constitutional authority.

In light of these concerns, the PEOPLE OF THE STATE OF MICHIGAN URGE THIS COURT TO OVERTURN THE EXECUTIVE IMPOUNDMENT OF WATER POLLUTION CONTROL FUNDS.

Respectfully submitted,

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